

this part has been given to all employers who have an obligation to contribute under the plan and to all employee organizations representing employees covered under the plan.

(4) A statement indicating how the withdrawal rules in the plan amendment would operate in the event of a sale of assets by a contributing employer or the cessation of the obligation to contribute or the cessation of covered operations by all employers.

(5) A copy of the plan's most recent actuarial valuation.

(6) For each of the previous five plan years, information on the number of plan participants by category (active, retired and separate vested) and a complete financial statement. This requirement may be satisfied by the submission for each of those years of Form 5500, including schedule B, or similar reports required under prior law.

(7) A detailed description of the industry to which the plan amendment will apply, including information sufficient to demonstrate the effect of withdrawals on the plan's contribution base, and information establishing industry characteristics which would indicate that withdrawals in the industry do not typically have an adverse effect on the plan's contribution base. Such industry characteristics include the mobility of employees, the intermittent nature of employment, the project-by-project nature of the work, extreme fluctuations in the level of an employer's covered work under the plan, the existence of a consistent pattern of entry and withdrawal by employers, and the local nature of the work performed.

(e) *Supplemental information.* In addition to the information described in paragraph (d) of this section, a plan may submit any other information it believes is pertinent to its request. The PBGC may require the plan sponsor to submit any other information the PBGC determines it needs to review a request under this part.

[61 FR 34083, July 1, 1996, as amended at 68 FR 61354, Oct. 28, 2003]

§ 4203.5 PBGC action on requests.

(a) *General.* The PBGC shall approve a plan amendment providing for the application of special complete or partial

withdrawal liability rules upon a determination by the PBGC that the plan amendment—

(1) Will apply only to an industry that has characteristics that would make use of the special withdrawal rules appropriate; and

(2) Will not pose a significant risk to the insurance system.

(b) *Notice of pendency of request.* As soon as practicable after receiving a request for approval of a plan amendment containing all the information required under § 4203.4, the PBGC shall publish a notice of the pendency of the request in the FEDERAL REGISTER. The notice shall contain a summary of the request and invite interested persons to submit written comments to the PBGC concerning the request. The notice will normally provide for a comment period of 45 days.

(c) *PBGC decision on request.* After the close of the comment period, PBGC shall issue its decision in writing on the request for approval of a plan amendment. Notice of the decision shall be published in the FEDERAL REGISTER.

§ 4203.6 OMB control number.

The collections of information contained in this part have been approved by the Office of Management and Budget under OMB control number 1212-0050.

PART 4204—VARIANCES FOR SALE OF ASSETS

Subpart A—General

Sec.

4204.1 Purpose and scope.

4204.2 Definitions.

Subpart B—Variance of the Statutory Requirements

4204.11 Variance of the bond/escrow and sale-contract requirements.

4204.12 *De minimis* transactions.

4204.13 Net income and net tangible assets tests.

Subpart C—Procedures for Individual and Class Variances or Exemptions

4204.21 Requests to PBGC for variances and exemptions.

4204.22 PBGC action on requests.

AUTHORITY: 29 U.S.C. 1302(b)(3), 1384(c).

SOURCE: 61 FR 34084, July 1, 1996, unless otherwise noted.

Subpart A—General

§ 4204.1 Purpose and scope.

(a) *Purpose.* Under section 4204 of ERISA, an employer that ceases covered operations under a multiemployer plan, or ceases to have an obligation to contribute for such operations, because of a bona fide, arm's-length sale of assets to an unrelated purchaser does not incur withdrawal liability if certain conditions are met. One condition is that the sale contract provide that the seller will be secondarily liable if the purchaser withdraws from the plan within five years and does not pay its withdrawal liability. Another condition is that the purchaser furnish a bond or place funds in escrow, for a period of five plan years, in a prescribed amount. Section 4204 also authorizes the PBGC to provide for variances or exemptions from these requirements. Subpart B of this part provides variances and exemptions from the requirements for certain sales of assets. Subpart C of this part establishes procedures under which a purchaser or seller may, when the conditions set forth in subpart B are not satisfied or when the parties decline to provide certain financial information to the plan, request the PBGC to grant individual or class variances or exemptions from the requirements.

(b) *Scope.* In general, this part applies to any sale of assets described in section 4204(a)(1) of ERISA. However, this part does not apply to a sale of assets involving operations for which the seller is obligated to contribute to a plan described in section 404(c) of the Code, or a continuation of such a plan, unless the plan is amended to provide that section 4204 applies.

§ 4204.2 Definitions.

The following terms are defined in § 4001.2 of this chapter: Code, employer, ERISA, IRS, multiemployer plan, PBGC, person, plan, plan administrator, plan sponsor, and plan year.

In addition, for purposes of this part:

Date of determination means the date on which a seller ceases covered operations or ceases to have an obligation

to contribute for such operations as a result of a sale of assets within the meaning of section 4204(a) of ERISA.

Net income after taxes means revenue minus expenses after taxes (excluding extraordinary and non-recurring income or expenses), as presented in an audited financial statement or, in the absence of such statement, in an unaudited financial statement, each prepared in conformance with generally accepted accounting principles.

Net tangible assets means tangible assets (assets other than licenses, patents copyrights, trade names, trademarks, goodwill, experimental or organizational expenses, unamortized debt discounts and expenses and all other assets which, under generally accepted accounting principles, are deemed intangible) less liabilities (other than pension liabilities). Encumbered assets shall be excluded from net tangible assets only to the extent of the amount of the encumbrance.

Purchaser means a purchaser described in section 4204(a)(1) of ERISA.

Seller means a seller described in section 4204(a)(1) of ERISA.

Subpart B—Variance of the Statutory Requirements

§ 4204.11 Variance of the bond/escrow and sale-contract requirements.

(a) *General rule.* A purchaser's bond or escrow under section 4204(a)(1)(B) of ERISA and the sale-contract provision under section 4204(a)(1)(C) are not required if the parties to the sale inform the plan in writing of their intention that the sale be covered by section 4204 of ERISA and demonstrate to the satisfaction of the plan that at least one of the criteria contained in § 4204.12 or § 4204.13(a) is satisfied.

(b) *Requests after posting of bond or establishment of escrow.* A request for a variance may be submitted at any time. If, after a purchaser has posted a bond or placed money in escrow pursuant to section 4204(a)(1)(B) of ERISA, the purchaser demonstrates to the satisfaction of the plan that the criterion in either § 4204.13 (a)(1) or (a)(2) is satisfied, then the bond shall be cancelled or the amount in escrow shall be refunded. For purposes of considering a request after the bond or escrow is in

place, the words “the year preceding the date of the variance request” shall be substituted for “the date of determination” for the first mention of that term in both § 4204.13 (a)(1) and (a)(2). In addition, in determining the purchaser’s average net income after taxes under § 4204.13(a)(1), for any year included in the average for which the net income figure does not reflect the interest expense incurred with respect to the sale, the purchaser’s net income shall be reduced by the amount of interest paid with respect to the sale in the fiscal year following the date of determination.

(c) *Information required.* A request for a variance shall contain financial or other information that is sufficient to establish that one of the criteria in § 4204.12 or § 4204.13(a) is satisfied. A request on the basis of either § 4204.13 (a)(1) or (a)(2) shall also include a copy of the purchaser’s audited (if available) or (if not) unaudited financial statements for the specified time period.

(d) *Limited exemption during pendency of request.* Provided that all of the information required to be submitted is submitted before the first day of the first plan year beginning after the sale, a plan may not, pending its decision on the variance, require a purchaser to post a bond or place an amount in escrow pursuant to section 4204(a)(1)(B). In the event a bond or escrow is not in place pursuant to the preceding sentence, and the plan determines that the request does not qualify for a variance, the purchaser shall comply with section 4204(a)(1)(B) within 30 days after the date on which it receives notice of the plan’s decision.

(e) *Method and date of issuance.* The PBGC applies the rules in subpart B of part 4000 of this chapter to determine permissible methods of issuance under this subpart. The PBGC applies the rules in subpart C of part 4000 of this chapter to determine the date that an issuance under this subpart was provided.

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[61 FR 34084, July 1, 1996, as amended at 68 FR 61355, Oct. 28, 2003]

§ 4204.12 *De minimis transactions.*

The criterion under this section is that the amount of the bond or escrow does not exceed the lesser of \$250,000 or two percent of the average total annual contributions made by all employers to the plan, for the purposes of section 412(b)(3)(A) of the Code, for the three most recent plan years ending before the date of determination. For this purpose, “contributions made” shall have the same meaning as the term has under § 4211.12(a) of this chapter.

§ 4204.13 *Net income and net tangible assets tests.*

(a) *General.* The criteria under this section are that either—

(1) *Net income test.* The purchaser’s average net income after taxes for its three most recent fiscal years ending before the date of determination (as defined in § 4204.12), reduced by any interest expense incurred with respect to the sale which is payable in the fiscal year following the date of determination, equals or exceeds 150 percent of the amount of the bond or escrow required under ERISA section 4204(a)(1)(B); or

(2) *Net tangible assets test.* The purchaser’s net tangible assets at the end of the fiscal year preceding the date of determination (as defined in § 4204.12), equal or exceed—

(i) If the purchaser was not obligated to contribute to the plan before the sale, the amount of unfunded vested benefits allocable to the seller under section 4211 (with respect to the purchased operations), as of the date of termination, or

(ii) If the purchaser was obligated to contribute to the plan before the sale, the sum of the amount of unfunded vested benefits allocable to the purchaser and to the seller under ERISA section 4211 (with respect to the purchased operations), each as of the date of determination.

(b) *Special rule when more than one plan is covered by request.* For the purposes of paragraphs (a)(1) and (a)(2), if the transaction involves the assumption by the purchaser of the seller’s obligation to contribute to more than one multiemployer plan, then the total amount of the bond or escrow or of the unfunded vested benefits, as applicable,

for all of the plans with respect to which the purchaser has not posted a bond or escrow shall be used to determine whether the applicable test is met.

(c) *Non-applicability of tests in event of purchaser's insolvency.* A purchaser will not qualify for a variance under this subpart pursuant to paragraph (a)(1) or (a)(2) of this section if, as of the earlier of the date of the plan's decision on the variance request or the first day of the first plan year beginning after the date of determination, the purchaser is the subject of a petition under title 11, United States Code, or of a proceeding under similar provisions of state insolvency laws.

Subpart C—Procedures for Individual and Class Variances or Exemptions

§ 4204.21 Requests to PBGC for variances and exemptions.

(a) *Filing of request*—(1) *In general.* If a transaction covered by this part does not satisfy the conditions set forth in subpart B of this part, or if the parties decline to provide to the plan privileged or confidential financial information within the meaning of section 552(b)(4) of the Freedom of Information Act (5 U.S.C. 552), the purchaser or seller may request from the PBGC an exemption or variance from the requirements of section 4204(a)(1)(B) and (C) of ERISA.

(2) *Method of filing.* The PBGC applies the rules in subpart A of part 4000 of this chapter to determine permissible methods of filing with the PBGC under this subpart.

(b) *Who may request.* A purchaser or a seller may file a request for a variance or exemption. The request may be submitted by one or more duly authorized representatives acting on behalf of the party or parties. When a contributing employer withdraws from a plan as a result of related sales of assets involving several purchasers, or withdraws from more than one plan as a result of a single sale, the application may request a class variance or exemption for all the transactions.

(c) *Where to file.* See § 4000.4 of this chapter for information on where to file.

(d) *Information.* Each request shall contain the following information:

(1) The name and address of the plan or plans for which the variance or exemption is being requested, and the telephone number of the plan administrator of each plan.

(2) For each plan described in paragraph (d)(1) of this section, the nine-digit Employer Identification Number (EIN) assigned by the IRS to the plan sponsor and the three-digit Plan Identification Number (PN) assigned by the plan sponsor to the plan, and, if different, also the EIN and PN last filed with the PBGC. If an EIN or PN has not been assigned, that should be indicated.

(3) The name, address and telephone number of the seller and of its duly authorized representative, if any.

(4) The name, address and telephone number of the purchaser and of its duly authorized representative, if any.

(5) A full description of each transaction for which the request is being made, including effective date.

(6) A statement explaining why the requested variance or exemption would not significantly increase the risk of financial loss to the plan, including evidence, financial or otherwise, that supports that conclusion.

(7) When the request for a variance or exemption is filed by the seller alone, a statement signed by the purchaser indicating its intention that section 4204 of ERISA apply to the sale of assets.

(8) A statement indicating the amount of the purchaser's bond or escrow required under section 4204(a)(1)(B) of ERISA.

(9) The estimated amount of withdrawal liability that the seller would otherwise incur as a result of the sale if section 4204 did not apply to the sale.

(10) A certification that a complete copy of the request has been sent to each plan described in paragraph (d)(1) of this section and each collective bargaining representative of the seller's employees by certified mail, return receipt requested.

(e) *Additional information.* In addition to the information described in paragraph (d) of this section, the PBGC may require the purchaser, the seller,

Pension Benefit Guaranty Corporation

§ 4206.1

or the plan to submit any other information the PBGC determines it needs to review the request.

(f) *Disclosure of information.* Any party submitting information pursuant to this section may include a statement of whether any of the information is of a nature that its disclosure may not be required under the Freedom of Information Act, 5 U.S.C. 552. The statement should specify the information that may not be subject to disclosure and the grounds therefor.

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[61 FR 34084, July 1, 1996, as amended at 68 FR 61355, Oct. 28, 2003]

§ 4204.22 PBGC action on requests.

(a) *General.* The PBGC shall approve a request for a variance or exemption if PBGC determines that approval of the request is warranted, in that it—

(1) Would more effectively or equitably carry out the purposes of title IV of ERISA; and

(2) Would not significantly increase the risk of financial loss to the plan.

(b) *Notice of pendency of request.* As soon as practicable after receiving a variance or exemption request containing all the information specified in § 4204.21, the PBGC shall publish a notice of the pendency of the request in the FEDERAL REGISTER. The notice shall provide that any interested person may, within the period of time specified therein, submit written comments to the PBGC concerning the request. The notice will usually provide for a comment period of 45 days.

(c) *PBGC decision on request.* The PBGC shall issue a decision on a variance or exemption request as soon as practicable after the close of the comment period described in paragraph (b) of this section. PBGC's decision shall be in writing, and if the PBGC disapproves the request, the decision shall state the reasons therefor. Notice of the decision shall be published in the FEDERAL REGISTER.

PART 4206—ADJUSTMENT OF LIABILITY FOR A WITHDRAWAL SUBSEQUENT TO A PARTIAL WITHDRAWAL

Sec.

4206.1 Purpose and scope.

4206.2 Definitions.

4206.3 Credit against liability for a subsequent withdrawal.

4206.4 Amount of credit in plans using the presumptive method.

4206.5 Amount of credit in plans using the modified presumptive method.

4206.6 Amount of credit in plans using the rolling-5 method.

4206.7 Amount of credit in plans using the direct attribution method.

4206.8 Reduction of credit for abatement or other reduction of prior partial withdrawal liability.

4206.9 Amount of credit in plans using alternative allocation methods.

4206.10 Special rule for 70-percent decline partial withdrawals.

AUTHORITY: 29 U.S.C. 1302(b)(3) and 1386(b).

SOURCE: 61 FR 34086, July 1, 1996, unless otherwise noted.

§ 4206.1 Purpose and scope.

(a) *Purpose.* The purpose of this part is to prescribe rules, pursuant to section 4206(b) of ERISA, for adjusting the partial or complete withdrawal liability of an employer that previously partially withdrew from the same multi-employer plan. Section 4206(b)(1) provides that when an employer that has partially withdrawn from a plan subsequently incurs liability for another partial or a complete withdrawal from that plan, the employer's liability for the subsequent withdrawal is to be reduced by the amount of its liability for the prior partial withdrawal (less any waiver or reduction of that prior liability). Section 4206(b)(2) requires the PBGC to prescribe regulations adjusting the amount of this credit to ensure that the liability for the subsequent withdrawal properly reflects the employer's share of liability with respect to the plan. The purpose of the credit is to protect a withdrawing employer from being charged twice for the same unfunded vested benefits of the plan. The reduction in the credit protects the other employers in the plan from becoming responsible for unfunded vested benefits properly allocable to